

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LIM PICKEN)	
Claimant)	
VS.)	
)	Docket No. 1,002,349
O'DONNELL & SONS CONSTRUCTION COMPANY, INC.)	
Respondent)	
AND)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the May 26, 2004 Award entered by Administrative Law Judge Kenneth J. Hursh. Stacy Parkinson of Olathe, Kansas, was appointed Board Member Pro Tem to serve in place of Board Member Julie A. N. Sample in this appeal. The Board heard oral argument on September 8, 2004.

APPEARANCES

Timothy M. Alvarez of Kansas City, Kansas, appeared for claimant. Randall W. Schroer of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a September 14, 2001 accident and resulting injuries to claimant's right upper extremity and left lower extremity. In the May 26, 2004 Award, Judge Hursh determined claimant was permanently and totally disabled.

Respondent contends Judge Hursh erred. Respondent argues claimant is entitled to receive benefits for two scheduled injuries under K.S.A. 44-510d instead of benefits for a permanent total disability. Respondent contends claimant is not entitled to receive permanent total disability benefits for his injuries as he did not sustain complete loss of either his right hand or left knee, which respondent argues is a prerequisite for permanent total disability when dealing with injuries to two extremities.

Respondent, in the alternative, argues claimant is not entitled to receive benefits for a permanent total disability as it is claimant's illiteracy rather than his injuries that has rendered him essentially unemployable. Consequently, respondent requests the Board to modify the Award and grant claimant benefits for two scheduled injuries.

Conversely, claimant requests the Board to affirm the May 26, 2004 Award.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board concludes the Award should be affirmed.

On September 14, 2001, claimant fell and was run over by a trailer while working for respondent. The accident injured claimant's right wrist, which was later fused. The accident also injured claimant's left knee, which will ultimately require a total replacement.

As a result of his September 14, 2001 accident, claimant sustained permanent injuries to his right wrist and left knee. One doctor, using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.), rated claimant's left lower extremity permanent functional impairment at 50 percent and his right upper extremity permanent functional impairment at 43 percent. Another doctor rated claimant's right upper extremity impairment at 33 percent under the AMA Guides (4th ed.), but that doctor did not provide an opinion regarding claimant's left lower extremity impairment.

The Judge awarded claimant permanent total disability benefits after finding claimant was essentially unemployable. Respondent disagrees.

The Workers Compensation Act provides that permanent total disability benefits are appropriate when an accident has rendered the worker completely and permanently incapable of engaging in any type of substantial, gainful employment. The Act also provides that certain injuries and conditions constitute permanent total disability.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.¹

In *Pruter*,² the Kansas Supreme Court interpreted the above-quoted language and held that a six percent permanent functional impairment to the right arm and a seven percent permanent functional impairment to the right leg created a rebuttable presumption that the worker had sustained a permanent total disability. The Kansas Supreme Court stated, in pertinent part:

Under the language of K.S.A. 44-510c, controlling case law interpreting the statute, and the presumption of an intent to change the law, we find that by the 1959 amendment to K.S.A. 44-510, the legislature intended that the combined loss of any of the listed members (eye, hand, arm, foot, leg) raises a presumption that the injured worker suffered permanent total disability.

Pruter's combination injuries to her right arm and right leg should have been presumed to constitute a permanent total disability, consistent with the reasoning in *Honn*. However, K.S.A. 44-510c(a)(2) says that such a combination injury is presumed to constitute a permanent total disability "in the absence of proof to the contrary." Here, as the Court of Appeals noted, Pruter sustained relatively minor injuries. The Board adopted the ALJ's findings, specifically that Pruter sustained only a 6% permanent impairment to her right upper extremity and a 7% permanent impairment to her right lower extremity. It was concluded that her impairment ratings would translate to a 7% functional impairment to the body as a whole. The evidence did not show that Pruter's injuries rendered her "completely and permanently incapable of engaging in any type of substantial and gainful employment," as required under K.S.A. 44-510c(a)(2). The evidence showed that Pruter was able to return to her position at Larned earning a comparable rate of pay. Under the facts here, the Court of Appeals was correct in concluding that Pruter's benefits should have been calculated based on two scheduled injuries.³ (Emphasis added.)

¹ K.S.A. 44-510c(a)(2).

² *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

³ *Id.* at 875-876.

The above indicates the Kansas Supreme Court did not require that claimant's limbs be severed or that there must be a complete loss of use of the injured body part before multiple injuries raise the presumption of permanent total disability. In its analysis, the Kansas Supreme Court cited the *Honn*⁴ decision. In *Honn*, the Kansas Supreme Court addressed the permanent disability benefits for a worker who had sustained a permanent partial loss of use of both feet. The Kansas Supreme Court stated:

Considering these provisions of the statute, we are forced to the conclusion that when two feet are injured, as in the case before us, the compensation should not be computed for each one separately, as for the injury to one foot as provided by the schedule, but should be computed under the provisions of the statute above quoted, "loss of both . . . feet . . . shall, in the absence of proof to the contrary, constitute a total permanent disability," and under the provision of subdivision (22) above referred to.⁵

Applying the *Pruter* decision to the claim now before us, claimant's combination injuries to the right wrist and left knee are presumed to constitute a permanent total disability. Moreover, the record does not establish that claimant retains the ability to work in any substantial and gainful employment. Conversely, the record supports the presumption that the September 2001 injuries rendered claimant incapable of performing substantial, gainful employment.

Claimant, who is right hand dominant, now has persistent numbness in his right little finger and ongoing swelling in his right hand despite the fusion to that wrist. Due to the right upper extremity injuries, claimant's ability to lift and carry items has been severely diminished. In addition, the evidence is uncontradicted that claimant now has bone on bone in his left knee, which further limits claimant's ability to work. Claimant's left lower extremity injuries stop him from squatting, crawling, kneeling, and climbing. Moreover, the left knee injury and resulting pain prevents claimant from standing for more than 15 minutes at a time and impels him to sit whenever possible. But the left knee pain also limits the period that he is able to sit.

Dr. P. Brent Koprivica examined claimant at his attorney's request. The doctor concluded that claimant is not employable. Dr. Koprivica testified, in part:

Q. (Mr. Alvarez) How would you summarize the medical profile of Mr. Picken as it relates to his employability?

⁴ *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

⁵ *Id.* at 458.

A. (Dr. Koprivica) Well, my impression was that he was not employable for a few reasons. First, he was functionally illiterate, so we're talking about a man that's having to do physical labor types of activities.

He's very limited posturally in terms of being on his feet and even sitting because of pain in the knee. People with disabling degenerative disease of their knee don't tolerate staying seated. They're more limited on being on their feet than they are sitting, but they're still limited in the sitting.

When you talk about employability medically, we're looking at the ability to sustain physical tasks on a predictable basis and he is not one that that is going to be something that he can predict. The severity of his pain throughout the day is going to vary. He's not going to be able to tell you, well, today I can do this particular activity for 15 minutes as opposed to 10 minutes. There's going to be some variation in that. And that lack of predictability negatively impacts his employability.

He has limitations on his upper extremity because he's got a fused wrist. He's got neuropathies associated with that, so we're talking about someone that doesn't have one flat tire, he's got two flat tires. So not only do you have a car with two flat tires but we have an old junker type of car, which is probably a bad analogy, but from the standpoint he doesn't have the capacities in terms of cognitive abilities that he would be able to do things that use your brain more because of his functional illiteracy.

And so when I look at that medically, I don't think it's realistic to try to accommodate for all of those factors. And those are the things that I look at as a doctor is, what is he going to do, what has he done in the past, what can be transferred. If he has a Ph.D., there are people that are in wheelchairs with ALS that still maintain some employability.

But he's not that type of a person. He doesn't have that advanced education. So now we're talking back *[sic]* it's all depending on physical capacities and his physical capacities are so unpredictable and so restricted, I don't believe that it's realistic to expect him to find work.⁶

The sole vocational expert to testify, claimant's expert witness Michael J. Dreiling, indicated claimant's ability to perform prolonged sitting was a critical factor in determining whether claimant could work. Mr. Dreiling explained, in part:

This individual's vocational profile indicates a person who has graduated from high school approximately 36 years ago, he has admitted problems with

⁶ Koprivica Depo. at 37-39.

reading, he has performed work throughout his lifetime of a more physical nature, he does not have any significant transferable skills, and he has had medical restrictions advised which will significantly limit the type and the amount of work that he could perform in the labor market.

When taking into account this individual's vocational profile and the fact that he does not have any typing skills, no computer skills, he has never performed sedentary type work activities, along with his description of his ability to function day-in and day-out, it becomes apparent that he is essentially and realistically unemployable in the current labor market.

If this individual cannot tolerate prolonged sitting activities, it is doubtful that he would be employable, even at entry level, unskilled, sedentary type work. In theory, assuming that he could tolerate prolonged sitting and could perform at least unskilled sedentary type activities, an imputed earning ability of entry level up to \$8 per hour would be realistic.

If this client does indeed have the difficulties with performing the prolonged sitting or the prolonged standing and needs a job where he can alternate between the two positions, it is highly unlikely that he would be employable.⁷

Dr. Koprivica testified after Mr. Dreiling and, as indicated above, testified how claimant's left knee injury prevented him from prolonged sitting and testified how claimant had to frequently alternate between sitting and standing.

Considering claimant's ongoing complaints of pain, Dr. Koprivica's testimony regarding claimant's abilities and restrictions, and Mr. Dreiling's assessment of claimant's potential labor market and ability to return to work, the Board concludes the evidence fails to overcome the presumption that claimant is permanently and totally disabled from engaging in any substantial and gainful employment. Consequently, the Board affirms the Judge's conclusion that claimant is essentially unemployable and, therefore, entitled to receive permanent total disability benefits.

Should claimant's ability to work improve due to the anticipated left knee replacement or by the natural healing process, the parties may review and modify claimant's award under K.S.A. 44-528.

The Board adopts the findings and conclusions set forth in the Award to the extent they are consistent with the above.

⁷ Dreiling Depo. at 26-27.

AWARD

WHEREFORE, the Board affirms the May 26, 2004 Award.

IT IS SO ORDERED.

Dated this ____ day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Randall W. Schroer, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director